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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOHN C. KALENBERG, AND RICHARD M. STARK,

Petitioners,

v.

HENRY S. REINKE, D/B/A LAKESIDE PROPERTIES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals for the Seventh Circuit err and act in contravention of the Full Faith and Credit Clause of the United States Constitution, as codified in 28 U.S.C. §1738 by basing its decision on a choice of law test?

II. Did the Court of Appeals for the Seventh Circuit err in failing to grant res judicata effect to a final state court judgment on the merits?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT BELOW

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit are as follows:

John C. Kalenberg

Richard M. Stark

Robert W. Boden

Henry S. Reinke, d/b/a Lakeside Properties

There are no parent or subsidiary companies to be listed pursuant to Rule 29.1 of the Rules of the United States Supreme Court.

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No.

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Petitioners,

v.

HENRY S. REINKE, d/b/a LAKESIDE PROPERTIES

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

John C. Kalenberg and Richard M. Stark respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The March 16, 1993 opinion of the United States District Court for the Northern District of Illinois, Eastern Division is unpublished but reprinted in Petitioners' Appendix at Appendix A. The January 10, 1995 opinion of the United States Court of Appeals for the Seventh Circuit is reported at 45 F.3d 166 (7th Cir. 1995), and is reprinted at Appendix B. The March 16, 1993 Judgment of the Northern District of Illinois, Eastern Division is reprinted at Appendix C. The July 10, 1991 Order and Memorandum of the State of Minnesota District Court, County of Hennepin, Fourth Judicial District is reprinted at Appendix D. The March 3, 1992 Unpublished Opinion of the State of Minnesota, Court of Appeals is reprinted at Appendix E.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on January 10, 1995. An extension was granted by Justice Stevens on March 31, 1995, extending the time within which a petition for certiorari must be filed until June 9, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court was invoked pursuant to the diversity of citizenship of the parties, 28 U.S.C. 1332.

STATUTES AND RULES INVOLVED

United States Constitution

Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof. U.S. Const., art. IV, §1.

United States Statutes

1738 State and Territorial Statutes and Judicial Proceedings; Full Faith and Credit

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 28 U.S.C. §1738.

Federal Rules of Civil Procedure

41. Dismissal with Actions. (b) Involuntary Dismissal: Effect Thereof:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule,

other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. Fed.R.Civ.P. 41.

Illinois Supreme Court Rules
Rule 273. Effect of Involuntary Dismissal

Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits. Ill.S.Ct. Rule 273.

Minnesota Supreme Court Rules
Rule 41.02. Involuntary Dismissal: Effect Thereof

(c) Unless the court specifies otherwise in its order, a dismissal pursuant to this rule and any dismissal not provided for in this rule or in Rule 41.01, other than dismissal for lack of jurisdiction, for forum non conveniens, or for failure to join a party indispensable pursuant to Rule 19, operates as an adjudication upon the merits. Minn.S.Ct.R. 41.02(c).

STATEMENT OF THE CASE

On September 25, 1989, Henry S. Reinke, d/b/a Lakeside Properties (hereinafter "Reinke"), admittedly an Illinois resident, chose to bring suit in Minnesota state

court alleging a breach of personal guarantees of a lease for property situated in Minnesota. Robert W. Boden (hereinafter "Boden"), Richard M. Stark (hereinafter "Stark"), and John C. Kalenberg (hereinafter "Kalenberg"), all Minnesota residents, filed their Joint Answer which contained an affirmative defense based upon the statute of limitations, after which they filed a motion for summary judgment based on the Minnesota six-year statute of limitations. In response to the defendants' motion for summary judgment, Reinke argued that the Illinois statute of limitations ought to be applied instead of the Minnesota statute. The Minnesota state court determined that Reinke's cause of action had fully accrued in May of 1982, and unconvinced by Reinke's argument to apply the Illinois statute of limitations, applied the Minnesota statute of limitations, and entered judgment against Reinke on the basis that his complaint was time-barred. Reinke then appealed the decision of the trial court to the Minnesota Court of Appeals. After conducting a de novo analysis of the question of whether to apply the Minnesota or Illinois statute of limitations, the appellate court held that the trial court correctly selected the Minnesota statute of limitations, and affirmed the decision of the trial court. Reinke then pursued an appeal to the Minnesota Supreme Court, which denied Reinke's petition for further review.

During the pendency of the Minnesota state court proceedings, Reinke was aware of the relevant time periods of both the Minnesota and Illinois statutes of limitation. During the pendency of the Minnesota state court proceedings, Reinke was aware of the residency of

all relevant parties and the situs of the property at issue.

In January, 1992, Reinke filed a diversity action in federal district court situated in Illinois against the same defendants. Reinke's complaint was essentially identical to the complaint he had chosen to initially file in Minnesota state court. Defendants moved for summary judgment based upon the principles of res judicata and the Full Faith and Credit Clause of the U.S. Constitution as also codified at 28 U.S.C. §1738. Reinke argued, as he had in Minnesota, that the Illinois statute of limitations should apply. This was the same argument advanced by plaintiff in the Minnesota suit, and expressly rejected by the Minnesota courts. The federal district court, citing Minnesota's own Supreme Court Rule 41.02(c)[1], Federal Rule of Civil Procedure Rule 41(b)[2], and Illinois Supreme

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[1]Minnesota Rule of Civil Procedure 41.02 provides:

(c) Unless the court specifies otherwise in its order, a dismissal pursuant to this rule and any dismissal not provided for in this rule or in Rule 41.01 [voluntary dismissal], other than a dismissal for lack of jurisdiction, for forum non conveniens, or for failure to join a party indispensable pursuant to Rule 19, operates as an adjudication upon the merits.

[2]Federal Rule of Civil Procedure 41, Dismissal with Actions, provides:

(b) **Involuntary Dismissal: Effect Thereof:** For failure of the plaintiff to prosecute or to comply with these rules or

Court Rule 273[3], agreed with the defendants, granted their motion for summary judgment, and dismissed the case based upon res judicata and the Full Faith and Credit Clause.

Reinke appealed the district court's decision to the Court of Appeals for the Seventh Circuit. The Seventh Circuit reversed, holding that plaintiff's action was not barred on res judicata principles, finding that the decision of the Minnesota courts was procedural, rather than on the merits. Mem.op. at B-12.

The Seventh Circuit began their analysis by stating that they must determine "the nature and scope of the

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any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

[3]Rule 273 of the Illinois Supreme Court, "Effect of Involuntary Dismissal" provides:

Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication upon the merits.

Minnesota judgment" in view of §1738. Mem.op. at B-8. However, after noting that the "correct characterization of the Minnesota judgment" was a "difficult" one, Mem.op. at B-9, the Seventh Circuit proceeded to disregard both Minnesota Supreme Court Rule 41.02(c) and Minnesota case law.

The Seventh Circuit admitted that Minnesota's own court of appeals considered a dismissal based on statute of limitations grounds to be an adjudication on the merits and thus a bar to successive suits, noting:

> The Minnesota Court of Appeals construed [Minnesota Supreme Court Rule 41.02(c)] and concluded that '[a] dismissal based on statute of limitation grounds is a decision on the merits.' Nitz v. Nitz, 456 N.W.2d 450, 451 (Minn.App. 1990).

Mem.op. at B-4. Nonetheless, the Seventh Circuit chose to regard both Nitz and Minnesota Supreme Court Rule 41.02(c) as irrelevant to their consideration, holding that Minnesota considered such a dismissal *procedural*. The Seventh Circuit reached this conclusion after reviewing the principles and objectives of res judicata, including the already overburdened courts and the promotion of judicial economy. However, the Court decided that the principles upon which Federal Rule of Civil Procedure 41(b) relied do not extend to Minnesota State Court, notwithstanding Minnesota's Supreme Court Rule 41.02(c), which mirrors Federal Rule of Civil Procedure 41(b), and the Minnesota case law. In so holding, the Seventh Circuit found that a state court "has no interest in barring further litigation in

another forum, state or federal." Mem.op. at B-16. Accordingly, the Seventh Circuit vacated the dismissal of the second lawsuit, and remanded the matter to the district court for further proceedings.[4]

Petitioners Stark and Kalenberg now seek certiorari review of that decision which reversed the granting of defendants' motion for summary judgment based on res judicata, the Full Faith and Credit Clause, Minnesota Supreme Court Rule 41.02(c), Illinois Supreme Court Rule 273, and Federal Rule of Civil Procedure 41(b). Reinke should be barred from maintaining the same cause of action against defendants some thirteen years after the cause of action accrued.

REASONS FOR GRANTING THE WRIT

1) The decision of the Court of Appeals for the Seventh Circuit seriously contravenes and creates a new interpretation of the Full Faith and Credit Clause of the United States Constitution, as codified in 28 U.S.C. §1738.

The Full Faith and Credit Clause of the United States Constitution, as codified in 28 U.S.C. 1738, is the source of the mandate that federal courts must honor the res judicata effects of state court judgments. The statute

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[4]Defendant Boden reached a settlement with plaintiff after the Seventh Circuit's decision, and is not a party to this litigation.

specifically requires that judicial proceedings in any state shall have full faith and credit "in every court within the United States." 28 U.S.C. §1738.

As this Court held in Allen v McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed. 2d 308 (1980), "The federal courts generally have also consistently accorded preclusive effect to issues decided by state courts....Thus, res judicata...promote(s) the comity between state and federal courts that has been recognized as a bulwark of the federal system...Indeed,...Congress has specifically required all federal courts to give preclusive effect to state court judgments whenever the courts of the State from which the judgments emerged would do so. 28 U.S.C. §1738." Id. at 415.

In Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), this Court again reaffirmed the res judicata effect of the mandate of section 1738, holding that a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of that State in which the judgment was rendered. Id. at 896.

In Marrese v. American Academy of Orthopedic Surgeons, 105 S.Ct. 1327, 470 U.S. 373, 84 L.Ed.2d 274 (1985), rehearing denied, 471 U.S. 1062, 105 S.Ct. 2127 (1985), this Court again reiterated: "The preclusive effect of a state court judgment in a subsequent federal lawsuit generally is determined by the full faith and credit statute. Section 1738 embodies concerns of comity and federalism that allow the States to determine, subject to the

requirements of the statute and the Due Process Clause, the preclusive effect of judgments in their own courts." Id. at 1332 and 380.

Accordingly, in the instant case, the preclusive effect of the Minnesota court's ruling is determined by reference to Minnesota law. Although various rationales have been posited as to limitations on the doctrine of preclusion, those are inapplicable to matters such as the instant case involving only state claims and where the jurisdiction of the federal forum is based solely on diversity. C. Wright, A. Miller and E. Cooper, *Federal Practice and Procedure: Res Judicata* §4469.

In the present case, the Seventh Circuit rendered a decision entirely in conflict with this Court's holdings and contrary to the mandate of section 1738. By declining to consider the Minnesota judgment an adjudication on the merits, the Seventh Circuit rejected the mandate of section 1738 by refusing to accord the final determination of the Minnesota state court full faith and credit. In so doing, the Seventh Circuit disregarded the principles of comity and federalism, and, furthermore, applied its own independent reasoning to Minnesota Supreme Court Rule 41.02(c), which mirrors Federal Rule of Civil Procedure 41(b). In analyzing the rationale of the Minnesota Rule, the Seventh Circuit gratuitously made a determination that only the federal system has an interest in the objectives underlying Federal Rule of Civil Procedure 41(b), and used that determination to buttress a decision which ignores the mandate of section 1738.

Rather than simply looking to the law of Minnesota and applying Minnesota's "on the merits" determination, the Seventh Circuit instead chose to interject a new prong into the existing res judicata analysis mandated by §1738. The federal court did so by positing the question of whether or not, in its own view, the "on the merits" determination that had been made by the state of Minnesota was reasonable. In so doing, the Seventh Circuit presented a new interpretation of and seriously contravened the Full Faith and Credit Clause.

The decision of the Seventh Circuit in the instant case resulted in a new interpretation by which a federal court can now review the reasoning behind state statutes and case law and determine whether that reasoning is satisfactory to the federal forum, thereby permitting a federal court to ignore a final judgment of a state court in contravention of the full faith and credit clause. The federal court had no authority to conduct such an analysis; a final state court decision had been rendered. The Seventh Circuit created a wholly new interpretation of the rights and responsibilities of a federal court in determining the res judicata status of a prior state decision.

Not only does the Seventh Circuit's decision create a new interpretation of the full faith and credit doctrine, the decision also contravenes the principles of the full faith and credit clause in its failure to appropriately apply res judicata to the facts of the instant case by looking to whether the determination made by the Minnesota trial court in dismissing plaintiff's action based upon the

Minnesota statute of limitations was correct.

As was stated in Wright v Georgia R.R. & Banking Co., 30 S.Ct. 242, 216 U.S. 420, 54 L.Ed. 544 (1910): " This court, as is well settled, accords to a judgment of a State only that effect given to it by the court of the State in which it was rendered." Id. at 245, at 428, at 544. This Court subsequently held in District of Columbia Court of Appeals v Feldman, 103 S.Ct. 1303, 460 U.S. 462, 75 L.Ed.2d 206 (1983), "...a United States District Court has no authority to review final judgments of a state court in judicial proceedings." Id. at 1315, 483, 206.

In the instant case, the Seventh Circuit, contrary to the clear mandate of this Court and the Full Faith and Credit clause, engaged in an improper choice of laws analysis in order to reach its final decision. The dismissal of Reinke's suit by the Minnesota trial court on statute of limitations grounds occurred only after the Minnesota trial court specifically addressed the issue of whether the Minnesota or Illinois statute of limitations applied. Having been presented with that particular question, the court specifically ruled that the Minnesota statute of limitations applied, and, accordingly, dismissed Reinke's suit as having been commenced after the relevant limitations period had terminated. The Minnesota Court of Appeals itself specifically addressed this issue yet again in its de novo review of the choice of law statute of limitations questions. After conducting its own inquiry, the Minnesota Court of Appeals specifically ruled that the Minnesota statute of limitations applied, and affirmed the trial court's dismissal.

The Court of Appeals for the Seventh Circuit, in again addressing and analyzing the same question that had already been decided by the Minnesota court, namely, which state's statute of limitations should be applied, conducted precisely the type of inquiry forbidden by this Court's holdings and section 1738.

Even if the Seventh Circuit reasoned that the judgment of the Minnesota trial court was incorrect, this Court's rulings and section 1738 forbid such a review of the underlying state court judgment by the federal court. The res judicata results of a final unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong. Baltimore S.S. Co. v. Phillips, 274 U.S. 316 (1927) as cited in Federated Department Stores, Inc., v. Moitie, 452 U.S. 394 (1981).

The Seventh Circuit incorrectly applied the principles of section 1738 and this Court's holdings to the instant case, although the district court for the Seventh Circuit, when faced with the same res judicata issue, properly analyzed the effect of the prior state court decision and found the federal action barred under res judicata principles. Hapaniewski v. City of Chicago Heights, 684 F.Supp. 1011 (N.D.Ind. 1988). There, as in the instant case, the plaintiff initially filed suit in state court and the state trial court granted defendant's motion to dismiss based upon statute of limitations grounds. Thereafter, the state appellate court, in Hapaniewski as in the instant case, affirmed the trial court's dismissal of plaintiff's action and plaintiff sought leave to appeal to the state supreme court, which was denied. Plaintiff then filed

suit in the district court of a second forum.

Following the holdings of this Court, the court in Hapaniewski found that a dismissal for failure to comply with the statute of limitations operates as a dismissal on the merits and dismissed plaintiff's claims based upon res judicata. Id. The court specifically stated: "To do what Hapaniewski now requests would require this court to review the state court decision. A federal district court, as a court of original jurisdiction, lacks appellate jurisdiction to review, modify or nullify a final order of a state court." Id. at 1015. In declining to agree with plaintiff's assertion that allowing plaintiff's claim would not result in prejudice to defendant, the Hapaniewski court stated that prejudice to defendants results solely from plaintiff's failure to have properly filed the prior action within the statutory period. That failure, in and of itself, was enough for the court to find that the defendants would be "greatly prejudiced" if plaintiff were allowed to present his claim. Id. at 1013.

The very purpose of Section 1738 is to prevent the overreaching exhibited by the Seventh Circuit in the instant case. It is beyond the purview of the Seventh Circuit to inquire into the rationale behind Minnesota Supreme Court Rule 41.02(c) and the case law supporting a finding that dismissals on statute of limitations grounds are on the merits. The Minnesota Supreme Court Rule mirrors Federal Rule of Civil Procedure 41(b), and the language of both rules is clear that a dismissal on statute of limitations grounds is an adjudication on the merits. Similarly, section 1738 prohibits the review made by the

Seventh Circuit of the reasoning behind the decision of the Minnesota trial court, subsequently affirmed in a de novo review by the Minnesota Court of Appeals.

2) The Court of Appeals for the Seventh Circuit has departed from the holdings of this Court by failing to grant res judicata effect to a final state court judgment on the merits.

It is axiomatic that a final judgment on the merits of an action precludes the parties from re-litigating issues that were or could have been raised in that action. Commissioner v. Sunnen, 333 U.S. 591 (1948) as cited in Federated Department Stores, Inc., v. Moitie, 452 U.S. 394 (1981). "The indulgence of a contrary view would result in creating elements of uncertainty and confusion in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of res judicata to avert." Reed v. Allen, 286 U.S. 191 (1932) as cited in Federated at 398.

This Court's rulings have foreclosed any determination other than that which affords preclusive, and, hence, res judicata effect to final state court judgments. Allen v McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed. 2d 308 (1980), Marrese v. American Academy of Orthopaedic Surgeons, 105 S.Ct. 1327, 470 U.S. 373, 84 L.Ed.2d 274 (1985), rehearing denied, 471 U.S. 1062, 105 S.Ct. 2127 (1985). In District Of Columbia Court of Appeals v Feldman, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), this Court held that "review of a final judgment of the highest judicial tribunal of a state is

vested solely in the Supreme Court of the United States,", citing with approval Feldman v. Gardner, 661 F.2d 1295, (1981).

There can be no question but that in the instant case the Seventh Circuit deviated from this Court's rulings by failing to accord res judicata effect to the prior state court judgment. The instant case involves the same parties, and the same "operative nucleus of facts." Anderson v. Werner Continental, Inc., 363 N.W.2d 332, (Minn.App. 1985). Pursuant to Minnesota Supreme Court Rule 41.02(c)[5], and Minnesota case law, a dismissal based on statute of limitation grounds is a decision on the merits. Nitz v. Nitz, 456 N.W.2d 450 (Minn.App. 1990). Nonetheless, in the instant case the Seventh Circuit held that Minnesota considered such a dismissal procedural, and refused to accord res judicata effect to the Minnesota trial court judgment which was later affirmed by the Minnesota Court of Appeals.

In reaching its conclusion, the Seventh Circuit refused to accord Minnesota Supreme Court Rule 41.02(c) its ordinary and customary meaning taken from the plain language of that rule. The Seventh Circuit chose to look behind the clear language and meaning of Minnesota Supreme Court Rule 41.02(c) and Minnesota case law. In so doing, the federal court reasoned that the principles underlying Federal Rule of Civil Procedure 41(b) could not be analogized to Minnesota Supreme

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[5]Minnesota Rule of Civil Procedure 41.02(c) is listed at footnote 1 on pgs. 7 of this Petition.

Court Rule 41.02(c), a nearly identical state rule, notwithstanding that state case law similarly treated dismissals on statute of limitations grounds as on the merits. In conducting such an inquiry, the federal court exceeded its authority in acting as an appellate state court, reviewing and nullifying a clear state law determination.

The principles underlying res judicata have resulted in the federal courts strict application of Federal Rule of Civil Procedure 41(b) to the matters before them. Similarly, as has been demonstrated by the enactment of Minnesota Supreme Court Rule 41.02(c), the state courts seek to address the same issues of judicial economy and prejudice to defendants. Accordingly, the federal courts, in attempting to determine the res judicata effect of prior state court decisions, cannot review the rationale behind that state's rules and case law.

Should this Court decline to address the overreaching of the Seventh Circuit, this Court would permit the federal courts, in contravention of this Court's holdings, to act as appellate courts and to permit said courts to refuse to follow the clear mandate of state orders. The effect of this Court declining to address the Seventh Circuit's opinion would be a substantial increase in the bringing of state claims in the federal courts sitting in diversity, thereby overburdening the federal system to an even greater degree. In view of the Seventh Circuit's decision in this matter, plaintiffs would be motivated to bring their state claims in state court initially, knowing that they would have the ability to get two bites at the apple, notwithstanding state court orders. Defendants, in

turn, would be motivated to remove matters into the federal system whenever diversity jurisdiction existed, and further, would be encouraged to create cross-claims or counter-claims which would allow the bringing of the action into the federal system.

In the instant case, Reinke began his trek through the judicial system by filing his case in Minnesota state court, arguing there that the Illinois statute of limitations should apply. In holding that the Minnesota six year statute of limitations was the proper benchmark, the trial court dismissed Reinke's claim on defendant's motion for summary judgment. Following Reinke's appeal, the trial court decision was affirmed and the Minnesota Supreme Court denied Reinke's leave to appeal. Reinke then brought the same action in federal district court in Illinois, which dismissed Reinke's claim on res judicata grounds.

The plain language of Minnesota Supreme Court Rule 41.02(c) and the attendant Minnesota case law dictates that the dismissal of Reinke's Minnesota action on statute of limitations grounds, not once, but twice, constituted an adjudication on the merits, and, therefore, a bar to Reinke's district court action. The Minnesota trial court specifically addressed the issue of whether Minnesota should apply the Illinois or Minnesota statute of limitations to Reinke's action, affording Reinke an opportunity to be heard on this issue. Only after such inquiry did the Minnesota trial court hold that the Minnesota statute applied and grant defendant's motion for summary judgment based upon the Minnesota statute of limitations. Following its own independent inquiry, the

Minnesota Court of Appeals affirmed the decision of the trial court.

The Seventh Circuit acted in contravention of the holdings of this Court in refusing to apply the proper res judicata determination to the prior state court judgment, and, instead, created a new methodology by which to conduct the res judicata analysis.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY S. REINKE d/b/a/ LAKESIDE PROPERTIES, Plaintiff,	)	
v.	)	92 C 744
ROBERT W. BODEN, RICHARD M. STARK, and JOHN C. KALENBERG Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff Henry S. Reinke d/b/a/ Lakeside Properties ("Reinke") brought a breach of contract suit against defendants Robert W. Boden, Richard M. Stark, and John C. Kalenberg (collectively, "defendants") in Minnesota state court. The Minnesota court granted defendants' motion for summary judgment on the grounds that the action was barred by the statute of limitations. Plaintiff then brought this breach of contract suit against defendants which is before the court on defendants' motion for summary judgment. For the reasons stated below, plaintiff's claims are barred by res judicata and defendants' motion for summary judgment is granted.

Background

Reinke filed the Minnesota Action on September 4, 1988, alleging that the Insulations Sales Company, a company controlled by defendants, defaulted on a lease of property owned by Reinke. Plaintiff argued that the longer Illinois statute of limitations applied to cause of action. However, the Minnesota court held that status of limitation are procedural, and applied the law of the forum. After so holding, the court entered summary judgment for defendants because plaintiff's suit was not brought within Minnesota's six-year statute of limitations. (Defendants' Supplemental Materials Required by 28 U.S.C. § 1738 ("Supp."). Ex. 9, p. 4)). The Minnesota Court of Appeals subsequently affirmed. Reinke v. Boden, 1992 Minn. App. LEXIS 207 (Minn. Ct. App. March 10, 1992); (Supp., Ex. 11). The Minnesota Supreme Court then denied Reinke's petition for review. (Supp., Ex. 12).

On January 29, 1992, Reinke filed a breach of contract suit against defendants in this court. The instant complaint is essentially identical to the complaint filed in Minnesota, except Reinke has added the jurisdictional allegation required by Federal Rule of Civil Procedure 8, and a prayer for "interest at the statutory rate for the vexatious refusal to make payment." (Cf. Complaint No. 89-15742, Supp., Ex 1; Complaint No. 92 C 0744).

Summary Judgment

Under Fed. R. Civ. P. 56, summary judgment is

appropriate when the record shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wolf v. City of Fitchburg, 870 F.2d 1327, 1329 (7th Cir, 1989). The moving party has the initial burden of establishing that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The non-moving party must then set forth specific facts through affidavits or other materials that demonstrate disputed material facts that must be resolved at trial. Id. at 324. The court must view all evidence in the light most favorable to the non-moving party and draw all reasonable inferences in its favor. Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986).

In the instant case, a legal, rather than factual issue is presented- whether plaintiff's action is barred by res judicata.

Res Judicata

Defendants contend that the doctrine of full faith and credit prevents this court from entertaining the instant action because all of the claims made, or which could have been made in plaintiff's Minnesota lawsuit, are res judicata. (Memorandum of Law in Support of Defendants' Motion for Summary Judgment ("Def. ether Memo"), p. 3). Plaintiff responds that the Minnesota court's grant of summary judgment based on the Minnesota statute of limitations does not have a

preclusive effect in federal court.[1] (Response to Defendants' Motion for Summary Judgment ("Response"), p. 2).

In considering whether res judicata [2] operates to bar the instant case, the court must look to 28 U.S.C. § 1738 ("Section 1738"), the federal statute which codifies the Constitution's Full Faith and Credit Clause. It reads in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by

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[1]The court rejects Reinke's argument that Defendants failed to properly certify the state court records as required by 28 U.S.C. §1738. Upon review of Defendants' Supplemental Materials Required by 28 U.S.C. §1738, the court finds that the submitted materials are certainly sufficient to verify the Minnesota judgment, as well as the adjudicated issues.

[2]Res judicata encompasses both "claim preclusion," which prevents litigants from raising unadjudicated issues which could have been litigated, and "issue preclusion," which prohibits litigants from relitigating matters that have been litigated and decided. Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 77 n.1 (1984) (citations omitted). This opinion uses the term res judicata to refer to issue preclusion.

> law or usage in the court of such State, Territory or Possession from which they are taken.

Thus, "Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." Kremer v. Chemical Constr. Corp., 456 U.S. 461, 466 (1982). Accordingly, the preclusive effect of the Minnesota court's ruling in the instant case, is determined by reference to Minnesota law. See Migra v. Warren City School Dist. Bd. of Ed., 465 U.S. 75, 81 (1984).

In general, "[r]es judicata bars a second suit for the same claim by the same party." Nitz v. Nitz, 456 N.W.2d 450, 451 (Minn.App. 1990). Specifically, a judgment on the merits constitutes an absolute bar to a second suit for the same cause of action, and is conclusive between parties, as to every matter which was actually litigated, and every matter which could have been litigated. Id. at 45`1. Two successive suits involve the same claims when both actions arise from the "same operative nucleus of facts." Id. (quoting Anderson v. Werner Continental, Inc., 363 N.W.2d 332, 335 (Minn.App. 1985).

Here, it is clear that this suit involves the same parties, and the "same operative nucleus of facts." It is equally clear that the Minnesota court's grant of summary judgment was "on the merits." Minnesota Rule of Civil Procedure 41.02 provides:

> (c) Unless the court specifies otherwise in its order, a dismissal pursuant to this rule and any dismissal not provided for in this rule or in Rule 41.01 [voluntary dismissal], other than a dismissal for lack of jurisdiction, for forum non conveniens, or for failure to join a party indispensable pursuant to Rule 19, operates as an adjudication upon the merits.

Minn.R.Civ. 41.02(c) (emphasis added). Significantly, in construing Rule 41.02, the Minnesota Courts of Appeal have explained: "A dismissal based on statute of limitations grounds is a decision on the merits." Nitz, 456 N.W.2d at 452. See also Simington v. Minnesota Veterans Home, 464 N.W.2d 529, 530 (Minn.App. 1990) ("Summary judgment based on a statute of limitations is a decision on the merits and as res judicata, it bars relitigation of the same issue."). Pursuant to this authority, the court agrees with defendants that "Minnesota courts would consider a judgment based upon the statute of limitations to be a judgment on the merits, and preclude other lawsuits on the same cause of action." (Def. Memo, p.4). Because Minnesota courts would consider plaintiff's Minnesota lawsuit precluded, so must this court. Kremer, 456 U.S. at 466.

Moreover, defendants' claim for preclusion is made stronger in this case by the fact that the Minnesota court decided not only that Minnesota's statute of limitations had expired, but also that the Illinois statute was inapplicable. That decision was then affirmed by the

Minnesota Court of Appeals, and Reinke's petition or review was denied by the Minnesota Supreme Court. If Reinke contends those decisions were erroneous, he cannot seriously contend that this court has the power to review the decisions of Minnesota's trial, appellate, and supreme courts with regards to when Minnesota's statute of limitations is applicable. In sum, Reinke's lawsuit is clearly res judicata under Section 1738.

In reaching this conclusion, the court rejects plaintiff's assertion that, because this is a diversity action, the court should look to Illinois law to determine the preclusive effect of the Minnesota lawsuit. (Response, pp.2-4). It is well settled that "[a] federal diversity court is required to accord all the res judicata effects that a judgment entered in another state would command as a matter of full faith and credit in any other state court." Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction §4472 at 730 (1981). Since a state court would be required to look to the preclusive effect of the judgment in the state which rendered the judgment, so would a federal diversity court. See Migra, 465 U.S. at 81. See also Felhaber v. Felhaber, 681 F.2d 1015 (5th Cir. 1982) (diversity action in which federal district court in Florida applied California preclusion law to California judgment); J.Aron & Co. v. Service Transp.Co., 515 F.Supp. 428, 436-38 (D.C.Md. 1981) (noting that federal diversity court must apply the res judicata principles of the state that rendered a prior judgment because full faith and credit requires a state court to do so).

Furthermore, even if federal or Illinois law were applied, this action would still be barred under Federal Rule of Civil Procedure Rule 41(b) and Illinois Supreme Court Rule 273. Under either of these rules, a dismissal based upon the statute of limitations is considered an adjudication on the merits. American Nat'l Bank & Trust Co. v. Chicago, 826 F.2d 1547, 1553 (7th Cir. 1987) ("When the first suit is dismissed under the statute of limitations, that is the end."), cert. denied, 484 U.S. 977 (1987); American Nat'l Bank & Trust Co. v. Chicago, 636 F.Supp. 374, 383 (N.D.Ill. 1986) ("Under Rule 273 it is really irrelevant that limitations dismissals are not accompanied by an airing of the 'merits' in the usual sense of that term"); Chang v. Northwestern Memorial Hosp., 549 F.Supp. 90, 95 (N.D.Ill. 1982) ("Under Rule 41(b), a dismissal based on the statute of limitations is on the merits."); (Maller v. Cohen, 531 N.E.2d 1029, 1031 (Ill.App. 1988) ("Supreme Court Rule 273 makes a dismissal on a general statute of limitation an adjudication on the merits").[3] In sum, all of the arguably relevant

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[3]Plaintiff relies on Fender v. St. Louis Southwestern Ry.Co., 392 N.E.2d 82 (Ill.App. 1979), which held that one state's decision that an action is barred by the statute of limitations will preclude a subsequent action in a different state on the same claim, only if the same statute of limitations applies. Id. at 85. Assuming arguendo that Fender is good law, the court agrees with the abundant and persuasive authority contradicting Fender's analysis. See e.g., Chang v. Northwestern Memorial Hospital, 549 F.Supp. 90, 94-95 (1982) (finding that Restatement provision on which Fender relies is superseded by Federal

authorities view a dismissal based on the statute of limitation as an adjudication on the merits.

Because Reinke fails to present any new claims which have not already been adjudicated, this court must give full faith and credit to the Minnesota judgment. Accordingly, defendants' motion for summary judgment is granted.

CONCLUSION

For the foregoing reasons, plaintiff's claims are barred by res judicata, and defendants' motion for summary judgment is granted. This action is dismissed.

Rule 41(b) and Illinois Supreme Court Rule 273); American Nat'l Bank & Trust Co. v. Chicago, 636 F.Supp. 374, 382 (N.D.Ill. 1982), aff'd 826 F.2d 1547 (7th Cir. 1987).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 93-1966
HENRY S. REINKE
d/b/a/ LAKESIDE PROPERTIES,
Plaintiff-Appellant,

v.

ROBERT W. BODEN, RICHARD M. STARK,
and JOHN C. KALENBERG,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 744 - **Ann Claire Williams**, Judge.

ARGUED NOVEMBER 4, 1993
DECIDED JANUARY 10, 1995

Before BAUER and RIPPLE, Circuit Judges, and REYNOLDS, District Judge.*

RIPPLE, Circuit Judge. This is an appeal from the district court's entry of summary judgment for the defendants Robert W. Boden, Richard M. Stark, and John

C. Kalenberg ("defendants"). The court held that the complaint of Henry S. Reinke, d/b/a Lakeside Properties ("Mr. Reinke"), was barred by res judicata. For the reasons articulated below, we reverse the judgment of the district court and remand the case for further proceedings.

I
BACKGROUND

Mr. Reinke, an Illinois resident, originally brought suit in September 1988 in Minnesota state court against the defendants, all Minnesota residents. His complaint alleged that the defendants had breached a written guarantee of a lease.[1] Although Mr. Reinke contended that Illinois' ten-year statute of limitations should control over Minnesota's six-year statute, the Minnesota trial court applied the Minnesota limitations period. The court determined that Mr. Reinke's cause of action had fully accrued in May 1982, and accordingly entered judgment against Mr. Reinke on the basis that his complaint was

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[1]In 1981, the parties had agreed that Mr. Reinke would pay $100,000 to the defendants for their interest in Lakeside Properties, a partnership the defendants owned. In return, the defendants agreed to lease property from Lakeside Properties for their business, Insulation Sales Company, for three years. Mr. Reinke claimed that the defendants unconditionally guaranteed the lease. Insulation Sales Co. failed to make the required payments. Mr. Reinke alleged that the company defaulted under the lease and that the defendants failed to honor their guarantee.

time-barred under Minnesota's limitations statute. The decision was affirmed by the state appellate court, and further review was denied by the Minnesota Supreme Court.

On January 29, 1992, Mr. Reinke filed this diversity action in federal district court in Illinois against the same defendants. His complaint was essentially identical to the one that he previously had filed in Minnesota. The defendants moved for summary judgment on the ground that Mr. Reinke's action was barred by res judicata. The district court agreed. It held that Mr. Reinke's diversity action was barred by res judicata and granted the defendants' summary judgment motion.

In reaching this conclusion, the district court relied upon 28 U.S.C. §1738,[2] which "requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged." *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 (1982). Relying on that mandate and the Court's later holding in *Migra v.*

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[2]The pertinent paragraph of 28 U.S.C. §1738 states:

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the Untied States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Warren City School District Board of Education, 465 U.S. 75, 81 (1984), the district court decided that the preclusive effect of the Minnesota court's ruling was to be determined by reference to Minnesota law. Turning then to Minnesota law, the court determined that Minnesota would consider a judgment on the merits to bar a second suit on the same cause of action between the same parties. *See Nitz v. Nitz*, 456 N.W.2d 450, 451 (Minn.App. 1990). The district court also observed that the present suit involved the same parties and same facts as the claim brought in Minnesota. It further noted that, in Minnesota, a summary judgment on the ground that the suit is barred by the statute of limitations is considered to be "on the merits" under Minnesota Rule of Civil Procedure 41.02(c).[3] The district court therefore determined that the Minnesota judgment precluded other lawsuits on the same cause of action. "Because Minnesota

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[3]Minnesota Rule of Civil Procedure 41.02 provides:

(c) Unless the court specifies otherwise in its order, a dismissal pursuant to this rule and any dismissal not provided for in this rule or in Rule 41.01 [voluntary dismissal], other than a dismissal for lack of jurisdiction, for forum non conveniens, or for failure to join a party indispensable pursuant to Rule 19, operates as an adjudication upon the merits.

The Minnesota Court of Appeals construed this rule and concluded that "[a] dismissal based on statute of limitation grounds is a decision on the merits." *Nitz*, 456 N.W.2d at 452.

would consider plaintiff's Minnesota lawsuit precluded, so must this court." Mem.op. at 6.[4]

The district court expressly rejected Mr. Reinke's assertion that this diversity action required the court to look to Illinois law for the preclusive effect of the Minnesota lawsuit. It stated:

> It is well settled that "[a] federal diversity court is required to accord all the res judicata effects that a judgment entered in another state would command as a matter of full faith and credit in any other state court." Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure: Jurisdiction §4472 at 730 (1981). Since a state court would be required to look to the preclusive effect of the judgment in the state which rendered the judgment, so would a federal diversity court. *See Migra,* 465 U.S. at 81.

Mem.op. at 7. Nevertheless, noted the court, the action would still be barred under federal and Illinois law because dismissal based upon the statute of limitations is considered an adjudication on the merits under Federal

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[4]The district court remarked that the case for res judicata was strengthened by the fact that the Minnesota court had held that its own statute of limitations was applicable and that the Illinois statute was inapplicable. Mem.op. at 6.

Rule of Civil Procedure Rule 41(b)[5] and Illinois Supreme Court Rule 273.[6]

II
DISCUSSION
1.

As this case comes to us, an Illinois citizen has attempted to bring an action in federal court in Illinois.

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[5]Federal Rule of Civil Procedure 41, Dismissal with Actions, provides:

(b) **Involuntary Dismissal: Effect Thereof:** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits.

[6]Rule 273 of the Illinois Supreme Court, "Effect of Involuntary Dismissal," provides:

Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an adjudication on the merits.

There are no issues regarding the requisite diversity jurisdiction or the exercise of in personam jurisdiction. Nevertheless, the federal court in Illinois, exercising jurisdiction based on the diversity of the citizenship of the parties, refused to hear this case because, in its view, the judgment of a Minnesota state court prevented it from doing so.

This previous Minnesota state court judgment involved the same cause of action and the same parties. That suit was dismissed by the Minnesota state court because, in Minnesota, the statute of limitations of the forum is employed, and the Minnesota statute of limitations barred the action. In reaching its decision, the Minnesota court rejected the argument that, rather than apply its own statute of limitations, it ought to use the statute of limitations of Illinois. In the past, the use of a statute of limitations other than that of the forum was usually, although not always,[7] considered the prerogative of the legislature. In recent times, however, such use of

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[7]*See, e.g. Heavner v. Uniroyal, Inc.,* 305 A.2d 412, 418 (N.J. 1973) (borrowing, by judicial decision, the statute of limitations of another state); *Cf. Warner v. Auberge Gray Rocks Inn, Ltee.,* 827 F.2d 938, 940-41 (3d Cir. 1987) (construing *Heavner* as requiring application of New Jersey law when state has significant interest in compensating its domiciliaries); *Henry v. Richardson-Merrell, Inc.,*508 F.2d 28 (3d Cir. 1975) (construing *Heavner* as requiring application of a foreign statute of limitations when foreign substantive law governs the action).

the statutes of limitations of the state whose substantive law governs the controversy has become "the emerging trend."[8] In rejecting an invitation to employ "the emerging trend," the Minnesota court explicitly noted that it was adhering to the traditional view that statutes of limitations are procedural in nature: "It is well-settled in our courts that the limitation of time statutes generally are procedural and that the law of the forum is applied." Mem.op. at 2.

2.

In assessing how the district court in Illinois, whose judgment is before us today, ought to treat this Minnesota decision, we note at the outset that the district court selected the correct starting point. Section 1738 of the Judicial Code commands in its third paragraph that, consistent with other constitutional strictures, a federal court must give the judgment of a state court the same effect that it would have in the courts of the state of rendition.[9] The task before us, then, is to determine the nature and scope of the Minnesota judgment and then to

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[8]Restatement (Second) of Conflict of Laws (1988 Revisions) §142 cmt. 3 (1988). Although not addressed specifically by the Minnesota courts or the district court, we shall assume that the substantive law of Minnesota would be applicable in this controversy involving the lease of Minnesota land.

[9]The pertinent part of 28 U.S.C. §1738 is recited in footnote 2.

follow the command of §1738. *See Marrese v. American Academy of Orthopaedic Surgeons,* 470 U.S. 373, 381 (1985); *Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 461, 481-82 (1982). Although we agree with the district court on the nature of the task before us, regretfully we find ourselves in respectful disagreement on the difficult question of the correct characterization of the Minnesota judgment.

3.

Determining whether an action is time-barred is a very basic and essential component of the litigation process. It is a task that ought to be achieved easily, definitively, and quickly. In recent times, however, no area of traditional adjective law has precipitated more ambiguity and caused more theoretical and practical snarls than this area. Accordingly, at the beginning of the discussion, it is helpful to set forth the major features of the received tradition regarding statutes of limitations - a tradition that still animates much of the governing law today.

Statutes of limitations traditionally have been characterized as falling into one of two categories. Some statutes of limitations are considered an integral part of the cause of action; when the statute of limitations runs, the cause of action is extinguished.[10] When a statute of

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[10]*See* Restatement (Second) of Conflict of Laws §143 cmt. c (1971); Eugene Scoles & Peter Hay, *Conflict of Laws* §3.10 (2d ed. 1992).

limitations is of this type, a judgment dismissing the cause of action because the time in which to bring suit has expired amounts to a decision "on the merits." Further litigation on that cause of action is barred. There is no contention, among either the litigants or the courts, that this sort of statute of limitations is at issue in this case.

The second and more common type of statute of limitations does not extinguish the cause of action upon the running of the limitations period; only the possibility of obtaining a remedy in that forum is gone. Such a determination is a matter of the forum's procedural law because it is designed to protect both the parties and the local courts against the prosecution of stale claims. Consequently, the dismissal bars a subsequent suit in that jurisdiction. a bar that cannot be avoided by shifting the legal theory or adding factual embellishment. However, under this traditional approach, a dismissal under this form of statute of limitations does not bar a subsequent suit in another jurisdiction. It simply means that the cause of action cannot be heard in the jurisdiction of dismissal because that jurisdiction considers suits of that vintage to be stale. That judgment establishes only that the suit is time-barred in the state of rendition; it says nothing about a suit in the second jurisdiction.[11]

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[11]*See Warner v. Buffalo Drydock Co.*, 67 F.2d 540, 541 (2d Cir. 1933) ("The decisions of the Supreme Court and the English cases all indicate that the judgment of the court of a foreign state which dismisses a cause of action because of the statute of limitations of the forum is not a decision on the merits and is not a bar to a new action

Finally, before turning to the case before us, the basic treatment of a statute of limitations of this second type in federal court ought to be recalled. When its jurisdiction is based on diversity of citizenship, a federal court is obliged to apply the statute of limitations of the state in which it sits. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 110, (1945). Therefore, a judgment on the ground of a statute of limitations in state court bars a subsequent suit on the same cause of action in a federal court sitting in that state because that federal court is obliged to apply the same statute of limitations as would the state court. This rule would seem to require also that, in a subsequent suit on the same cause of action in a federal court sitting in another state, the second federal court ought to apply, in obedience to *Guaranty*, the statute of limitations of the state in which it sits. As we note below, however, countervailing federal concerns embodied in the federal rules might alter the result in this latter situation. *Cf. Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (holding that "*Erie* and its offspring cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts"); *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958) (holding that "the federal policy favoring jury decisions of disputed fact" in civil trials was an "affirmative countervailing consideration[]" to the mandate of *Erie*).

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upon the identical claim in the courts of another state."), *cert. denied*, 291 U.S. 678 (1934).

We turn now to an examination of the judgment of the Minnesota court. As noted earlier, both the trial and appellate courts in Minnesota, in the course of rejecting the argument that they ought to use the Illinois statute of limitations instead of the Minnesota statute of limitations, pointed out that, in Minnesota, statutes of limitations are procedural devices. Indeed, they noted that a forum ought to use its own statute of limitations and not that of another jurisdiction. Because Minnesota adheres to this traditional view of the procedural nature of a statute of limitations, the Minnesota courts' conclusion that the cause of action is barred by its statute of limitations is, on its face, nothing more than a determination that the action is time-barred in Minnesota. A Minnesota judgment holding that the Minnesota statute of limitations bars the maintenance of a suit in Minnesota says nothing about whether Illinois will allow the suit.

The district court was of the view that this straightforward analysis was complicated by the fact that Minnesota, as a matter of its internal procedural rules, has termed a dismissal on the ground of statutes of limitations to be a "judgment on the merits." This rule, according to the district court's analysis, trumps Minnesota's frank and explicit acknowledgment that statute of limitations matters are procedural and that a forum ought to use its own procedure. In short, according to the district court, the Minnesota courts' determination that the case is late in terms of the Minnesota statute of limitations must also bar any independent determination by Illinois statute that the suit can be brought in Illinois.

There is a line of cases that might appear to offer some support for the view of the district court. These cases hold that, when successive actions are brought in different federal courts, a determination by the first federal court that the cause of action is barred by the statute of limitations of one state bars a successive action in a second federal court - even though that second court would apply a different statute of limitations, the statute of the state in which it sits. Almost all federal courts that have reached this result have justified their decision by reliance on the last sentence of Rule 41(b) of the Federal Rules of Civil Procedure.[12] That sentence states that all dismissals other than the ones mentioned in the rule (statute of limitations is not among them) are adjudications on the merits.

We do not believe that this line of cases can

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[12]*See Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir.) (per curiam), *cert. denied*, 112 S.Sct. 407 (1991); *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 880 F.2d 818, 820 n.1 (5th Cir. 1989); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180 (4th Cir. 1989); *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896-97 (2d Cir.), *cert. denied*, 464 U.S. 936 (1983); *Cemer v. Marathon Oil Co.*, 583 F.2d 830, 831-32 (6th Cir. 1978) (per curiam); *Sack v. Low*, 478 F.2d 360, 364, (2d Cir. 1973); *cf. Nathan v. Rowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) (noting that a summary judgment on the ground of the running of the statute of limitations is a judgment on the merits); *Myers v. Bull*, 599 F.2d 863, 865 (8th Cir.) (per curiam) (same), *cert. denied*, 444 U.S. 901 (1979).

control the situation we have before us. These cases involve situations in which the original adjudication as well as the second suit were in a federal district court. Whatever might be the merit of this approach in cases that involve successive suits in the federal courts - and there has been serious criticism[13] - the rationale of these decisions cannot control our case. Unlike any of these cases, we do not have before us two successive federal suits. This difference is not a formalistic one. An intrasystem use of res judicata for dismissals on the ground of the expiration of a statute of limitations promotes judicial economy within that system. Therefore, it is in the interest of that system to give res judicata effect to the first judgment. Indeed, in *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 870 F.2d 1044, 1046 (5th Cir. 1989), Judge Johnson identified this federal interest in applying a federal rule of res judicata to the first judgment. He noted that the rule was necessary to protect "the already overburdened district courts of the United States to hear the same claims over and over again." I the context of the inter-system use of res judicata, however, the intent of the first forum to save the judicial resources of the second cannot be so readily presumed. The first forum does not share the same interest in restricting the scope of tits judgment because any subsequent suit will take place in the forum of another system. Notably, in its denial of rehearing en

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[13]*See Sack*, 478 F.2d at 368 (Friendly, J.); 18 Charles A. wright et al., *Federal Practice and Procedure* §4441 (1981); Allan R. Stein, *Erie and Court Access*, 100 Yale L.J. 1935, 1937 n.11 (1991).

banc in *Steve D. Thompson Trucking, Inc. v. Dorsey Trailers, Inc.*, 880 F.2d 818, 819 (5th Cir. 1989), the Fifth Circuit stated explicitly that its reliance on Rule 41(b) in the situation of successive federal appeals did not announce a departure from the traditional approach to statutes of limitations followed in cases in which the earlier judgment was rendered by a state court.

Here, the district court was asked to recognize the judgment of a state court. Therefore, our task is to determine the scope that Minnesota intended to give to a judgment based on the running of the statute of limitations.[14] The district court was of the view that Minnesota's enactment of a rule of court that closely mirrors Federal Rule 41(b) evidences, in a definitive way, that Minnesota has chosen to characterize all statutes of limitations decisions rendered by its state courts as precluding all litigation on the same cause of action between the same parties in *any* court.[15] At the outset, we

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[14]*Cf. Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) ("The question for us, therefore, is...whether [Minnesota] would consider a dismissal based on this particular limitations provision to be a dismissal 'on the merits.'"), *cert. denied*, 476 U.S. 1159 (1986).

[15]The Court of Appeals for the Eighth Circuit appears to have assumed, in dictum, that Minnesota intends that judgments of dismissal based on its statute of limitations be given res judicata effect in other jurisdictions. *See Austin v. Super Valu Stores, Inc.*, 31 F.3d 615, 618 (8th Cir. 1994). The opinion provides no analysis

note that several considerations militate against attributing such a radical course to Minnesota. As we have just seen, it is not at all clear that such an interpretation of Rule 41(b) would be faithful to its intended purpose. Nor is it at all clear that the federal rule was intended to abrogate the traditional rule that a dismissal on the ground of the running of the statute of limitations acts as a bar to "[successive actions in different systems of courts." 18 Charles A. Wright et al., *Federal Practice and Procedure* §4441, at 369 (1981). Courts that have relied upon Rule 41(b) as a bar to successive suits have restricted such a strict rule of preclusion to successive statute of limitations judgments within the federal court system. In this context, considerations of judicial economy make such a reading at least plausible because it is possible to ascertain a motivation for the first federal forum's placing such a limitation on its judgment. By contrast, it is difficult to discern the same motivation in Minnesota. Minnesota has no interest in barring further litigation in another forum, state or federal.

The impact of the reading given the Minnesota

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on the point. In *Austin*, the court decided that a ruling by a federal district court in Louisiana, which had dismissed a previous suit on the ground that the Louisiana statute of limitations barred the action, was res judicata in a alter proceeding brought in the federal district court in Minnesota. *Id.* at 620. We also note that the court held that the res judicata effect of a judgment obtained in federal court sitting in diversity was determined by state and not federal law. *Id.* at 618.

rule by the district court also counsels restraint in attributing such an expansive intent to Minnesota. Such an interpretation would allow Minnesota to bar any relief in any state, no matter how important the connection of the litigation with that second state. For instance, if Minnesota had only the most tangential relationship with the litigation, a judgment that its statute of limitations had expired would bar litigation even in a state which had a very important interest in serving as the forum and whose statute of limitations had not expired. Therefore, the cases upon which the defendant relies, involving successive suits in the same court system, simply do not support the broad extension taken by the court here.

Moreover, there is concrete evidence that Minnesota did not intend such a radical role for its court rule. Although the Minnesota Court of Appeals has noted that a statute of limitations dismissal amounts to a dismissal on the merits, it has not done so in the context of the inter-system situation presented here. *See Nitz v. Nitz,* 456 N.W.2d 450, 452 (Minn.App. 1990). Indeed, the *Nitz* court cited the Fifth Circuit's decision in *Steve D. Thompson,* the very decision in which, upon denial of rehearing en banc, the court noted that it did not purport to apply the "decision with prejudice" rationale derived from Rule 41(b) to an intersystem situation. Moreover, in this very case, the state trial court in Minnesota noted that it was "well-settled in our courts that the limitation of time statutes generally are procedural and that the law of the forum is applied." Mem.op. at 2. In similar fashion, the appellate court in Minnesota noted that matters involving procedure and remedies are governed by the law

of the forum and that the state statute of limitations is one of those matters. In short, the Minnesota courts in this litigation took the view that statutes of limitations are procedural and that each forum ought to apply its own. It is difficult to attribute to such a court the intent to make its statute of limitations decision binding on all other jurisdictions.

5.

Because no deference is owed to the Minnesota judgment, we just determine whether an Illinois court would preclude this suit on the ground that it was barred by Illinois statute of limitation principles. It is clear that, as a general rule, Illinois considers statute of limitations matters to be procedural and applies the law of the forum state. *See Cox v. Kaufman,* 571 N.E.2d 1011, 1015 (Ill.pp.Ct. 1991). It also seems well established in Illinois that a dismissal in an Illinois court based on the statute of limitations bars any subsequent action in Illinois. *See American Nat'l Bank & Trust v. City of Chicago,* 826 F.2d 1547, 1553, (7th Cir.), *cert. denied,* 484 U.S. 977 (1987); *Chang v. Northwestern Memorial Hosp.,* 549 F.Supp. 90, 93 (N.D.Ill. 1982). On the other hand, we cannot say that Illinois has forsaken its traditional position that dismissal of a suit on the ground that the action does not meet the statute of limitations of a foreign jurisdiction precludes suit in Illinois only if the same statute of limitation applies. *See Fender v. St. Louis Southwestern Ry.,* 392 N.E.2d 82, 85 (Ill.App.Ct. 1979). The law in Illinois is

compatible with the weight of authority.[16]

Conclusion

We hold that the Minnesota judgment did not preclude the commencement of an action in the district court in Illinois. Accordingly, the judgment of the district court is reversed and the case is remanded for further proceedings in conformity with this opinion.

REVERSED AND REMANDED.

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[16]*See, e.g. Fender,* 392 N.E.2d 85 ("[A] decision of a court in one state holding that an action is barred by a statute of limitations will preclude the maintenance of a subsequent action in another state on the same claim only if the same statute of limitations applies."); *Chang,* 549 F.Supp. at 93 (stating rule applicable to its case: "[T]he dismissal of a case on limitations grounds in one jurisdiction is a bar to another action *in the same jurisdiction.*). Cf. Restatement (Second) of Conflict of Laws §§110 & 142 cmt. f; Restatement (Second) of Judgments §19, cmt. f. (1988); James Wm. Moore et al., 1B *Moore's Federal Practice* ¶0.409[6]; Charles A. Wright et al., *Federal Practice and Procedure* §4441.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HENRY S. REINKE d/b/a/ LAKESIDE PROPERTIES, Plaintiff,	)	JUDGMENT IN A CIVIL CASE
v.	)	92 C 744
ROBERT W. BODEN, RICHARD M. STARK, and JOHN C. KALENBERG Defendants.	)	

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered. IT IS ORDERED AND ADJUDGED: that pursuant to the court's memorandum opinion and order entered March 16, 1993, summary judgment is entered in favor of defendants and against plaintiff and finding that plaintiff's claims are barred by res judicata and this action is dismissed.

Date: March 16, 1993

H. Stuart Cunninghan
Clerk, by Deputy Clerk

APPENDIX D

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN
FOURTH JUDICIAL DISTRICT

Henry S. Reinke, an individual,
d/b/a Lakeside Properties,
Plaintiff,

vs. ORDER

Robert W. Boden, an individual, File No. 89-15742
Richard M. Stark, an individual,
sand John C. Kalenberg, an individual,
Defendants.

The above-entitled matter came on for hearing before the Honorable Michael J. Davis, Judge of District Court, on June 17, 1991, upon motion of Defendants for summary judgment and cross-motion of Plaintiff for summary judgment.

Alan Goldberg, Esq., appeared for and on behalf of Plaintiff.

Bruce C. Faulken, Esq., appeared for and on behalf of Defendant.

Based upon all the files, records, and proceedings herein, together with arguments of counsel, and the Court

being duly advised in the premises,

IT IS HEREBY ORDERED:

1. That Defendant's motion for summary judgment is granted.

2. That Plaintiff's motion for summary judgment is denied.

3. That the attached Memorandum is incorporated herein by this reference.

There being no just reason for delay,

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated 7-10-, 1991

BY THE COURT

Michael J. Davis
Judge of District Court

MEMORANDUM

On June 4, 1981, Plaintiff Henry S. Reinke, an Illinois resident, agreed to purchase Defendants' interest in a partnership referred to as "Lakeside Properties" for $100,000.00. As part of the agreement, a company controlled by Defendants, Insulation Sales Company ("ISC"), entered into a lease with Plaintiff for the rental of some commercial property owned by Lakeside Properties. The term of the lease extended from June 1, 1981 to May 31, 1986. Defendants, as officers of ISC, personally guaranteed ISC's performance as the lessee. Soon thereafter, however, ISC defaulted on the lease and ultimately filed a Chapter 11 bankruptcy petition on February 9, 1982.

In the course of the bankruptcy proceedings, attorneys for ISC, its secured lender, and Plaintiff executed an agreement whereby ISC elected to reject the lease with Plaintiff and vacate the premises by May 31, 1982. After unsuccessful settlement negotiations, Plaintiff commenced this action on September 14, 1988, seeking $112,346.59 on the terms the lease and the guarantees.

Defendants now move for summary judgment claiming Plaintiff's cause of action is time-barred by our statute of limitations. Plaintiff also moves for summary judgment, claiming the more generous Illinois statute of limitations applies and that it is entitled to judgment as a matter of law.

Summary judgment is appropriate where no issue

of material fact exists and one party is entitled to judgment as a matter of law. Minn.R.Civ.P. 56.03. The moving party has the burden of showing there is no genuine issue of material fact and that it is entitled to summary judgment as a matter of law. Sauter v. Sauter, 244 Minn. 482, 70 N.W.2d 351, (1955). The nonmoving party has the benefit of that view of the evidence most favorable to it. Id. The instant case concerns a few issues of law as applied to facts which are not disputed. It is therefore well suited to resolution by summary judgment.

The first legal issue is whether the Minnesota or Illinois statute of limitations applies to this case. It is well-settled in our courts that limitation of time statutes generally are procedural and that the law of the forum is applied. Davis v. Furlong, 328 N.W.2d 150, 153 (Minn. 1983); Knipfer v. Buhler, 227 Minn. 334, 35 N.W.2d 425 (1949); In re estate of Daniel, 208 Minn. 420, 292 N.W. 465 (1940). This case presents no special circumstances requiring an exception be made to that long-standing rule. The Minnesota state of limitations therefore will govern these proceedings.

The relevant statute in Minnesota requires that contract claims be brought within six years from the accrual of the cause of action. Minn.Stat. s. 541.05 subd. 1(1) (1986). A cause of action for breach of contract accrues immediately upon breach, and the statute of limitations begins running forthwith, even though the actual damage resulting thereof does not occur till later. Bacherts v. Hayes-Lucas Lumber Co., 201 Minn. 171, 275 N.W.. 694 (1937). Likewise, the right to sue upon a

guaranty accrues immediately upon the breach of the principle. See e.g., 54 C.J.S. *Limitations of Actions* s. 144 (1987).

Plaintiff, citing Honn v. National Computer Systems, Inc., 311 N.W.2d 1 (Minn. 1981), argues this case should be governed by the principle that when an obligation is to be paid in installments, a separate cause of action accrues upon each failure to make payment of an installment when due. The case at bar, however, does not involve such an obligation. In the instant case, the lawyers entered into a stipulation on March 30, 1982, wherein ISC elected to reject the lease. The bankruptcy court adopted the stipulation in a subsequent order affirming that ISC rejected the lease as of May 31, 1982. The debtor here completely rejected the *entire* lease, effective on a specific date, in agreement with its creditor. Under these circumstances, the creditor's total claim cannot be said to be contingent on the debtor's failure timely to make future installments. Any claim arising from the contract is fully matured at such a breach, and the statute of limitations must begin immediately to run on the entire claim.

This Court finds the rejection and termination of the lease on May 31, 1982, to constitute a breach of the entire lease, including all future obligations thereunder. That breach of the principle thereby gave Plaintiff an immediate and fully accrued cause of action against the defendant-guarantors for all future payments, and started the clock on the limitations period for any claim under the guarantees.

Because Plaintiff had an immediate, fully-accrued claim against Defendants for all damages resulting from the breach on May 31, 1982, the present action, commenced September 14, 1988, is untimely and barred by Minn. Stat. s. 541.05, subd 1(1). Summary judgment, therefore, in Defendants' favor must be granted as a matter of law.

M.J.D.

APPENDIX E

<u>This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. x. 480A.08, subd. 3 (1990).</u>

**STATE OF MINNESOTA
IN COURT OF APPEALS
C6-91-1990**

Hennepin County
District Court File 8915742

Randall, Judge

Henry S. Reinke, d/b/a
Lakeside Properties,

Appellant,

Alan M. Goldberg
105 W. Madison St.,
Suite 2200
Chicago, IL 60602

Wright S. Walling
George T. Stephenson
Walling & Berg, P.A.
701 Fourth Ave. S.
Suite 650
Minneapolis, MN 55415

vs.

Robert W. Boden, et al.,

Respondents.

Bruce C. Faulken
325 Cedar St., Suite 270
St. Paul, MN 55101

Filed: March 10, 1992
Office of Appellate Courts

Considered and decided by Randall, Presiding Judge, Huspeni, Judge, and Short, Judge.

UNPUBLISHED OPINION

Randall, Judge

Appellant challenges the trial court's conclusion that his claim was barred by the statute of limitations. We affirm.

FACTS

In June of 1981, appellant Henry S. Reinke entered into an agreement to purchase several properties from Insulation Sales Corporation ("ISC"), a Minnesota corporation. At the time of sale, appellant agreed to lease one of the properties back to ISC. The lease was to run for five years and did not contain an acceleration clause. As part of the written lease agreement, respondents Robert W. Boden and Richard M. Stark, officers of ISC at the time of the sale, signed a personal guarantee clause which provided:

> Guarantor hereby guarantees the payment of rent and performance by lessee, lessee's heirs, executors, administrators, successors or assigns of all covenants and agreements of the above lease.

Shortly after executing the lease, ISC defaulted. In February 1982, ISC filed a petition for Chapter 11 reorganization in United States Bankruptcy Court for the District of Minnesota. Appellant began an adversarial proceeding in bankruptcy court to require ISC to either assume or reject the lease under section 365 of the Bankruptcy Code.

Prior to the hearing, appellant, ISC and ISC's secured lender, entered into a stipulation agreement whereby ISC elected to reject the lease as of May 31, 1982, and agreed to pay appellant the rent payable through May. The stipulation provided that ISC would vacate the property by May 31, and appellant would be free to relet the premises. The bankruptcy court adopted the stipulation in an order disposing of the matter.

In September of 1988, appellant brought suit against respondents seeking to recover under the guarantee clause in the lease. Both parties moved for summary judgment. The trial court concluded the applicable statute of limitations barred appellant's claim and granted respondent's motion for summary judgment. This appeal followed.

DECISIONS

1. Appellant claims the trial court erred in applying the Minnesota statute of limitations rather than the Illinois statute. The Minnesota statute provides that a claim based upon a breach of contract must be commenced within six years. Minn. Stat. s 541.05, subd.

1 (1990). Appellant urged the court to apply the Illinois statute of limitations which provides such a claim may be brought within ten years. Ill. Rev. Stat. ch. 110, para. 13-206 (1989).

The decision of which statute to apply is a question of law, and "(t)he trial court's conclusions of law are not binding on this court and may be reviewed de novo." Western Insulation Servs. v. Central Nat'l Ins. Co., 460 N.W.2d 355, 357 (Minn. App. 1990) (citing A.J. Chromy Constr. Co. v Commercial Mechanical Servs., 260 N.W.2d 579, 582 (Minn. 1977)).

In Minnesota "(m)atters involving procedure and remedies (are) governed by the law of the forum states." Davis v. Furlong, 328 N.W.2d 150, 153 (Minn. 1983); Gate City Fed. Sav. & Loan Ass'n. v. O'Connor, 410 N.W.2d 448, 450 (Minn. App. 1987), pet. for rev. denied (Minn. Oct. 21, 1987).

> The limitation of time within which an action may be brought relates to the remedy and is governed by the law of the forum.

In Re Estate of Daniel, 208 Minn. 420, 427, 294 N.W. 465, 469 (1940), quoted in United States Leasing Corp. v. Biba Info. Processing Servs., 436 N.W.2d 823, 825 (Minn. App. 1989), pet. for rev. denied (Minn. May 24, 1989); accord Cuthbertson v. Uhley, 509 F. 2d 225, 226 (8th Cir. 1975). The trial court properly applied Minnesota Statute section 541.05, subdivision 1 to this action.

2. Appellant next claims the trial court erred by finding the statute of limitations barred his entire claim. Appellant argues his claim under the lease did not begin to run until each successive rent payment fell due under the lease. Thus, he argues, only the claim for rent falling due more than six years before he filed this claim is barred by the statute. We disagree and find all claims for rent are barred.

A. Federal Bankruptcy Law

Through the stipulation, ISC rejected the lease as of May 31, 1982. Section 365 (g) of the Bankruptcy Code provides that "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of the contract or lease." 11 U.S.C. s. 365 (g) (1988). Under the Bankruptcy Code:

> the lessor's claim for breach survives the Trustee's rejection; thus, the lessor can still look to the person or entity that guaranteed the debtor's lease obligations. In other words, the liability of a guarantor for a debtor's lease obligations is not altered by the Trustee's rejection of the lease.

In Re Modern Textile, Inc., 900 F.2d 1184, 11991 (8th Cir. 1990).

Where a lease is rejected, federal law defines the application of the Bankruptcy Code and its terms, but

> the question of the legal consequences of one

party's failure to perform its remaining obligations under a contract is an issue of state contract law.

In Re Cochise College Park, Inc., 703 F.2d 1339, 1348 n.4 (9th Cir. 1983), quoted in In Re Terrell, 892 F.2d 469, 471 (6th Cir. 1989); see also In Re Streets & Beard Farm Partnership, 882 F.2d 223, 235 (7th Cir. 1989) (federal law determines definition of executory contract but state law determines whether a material breach of the contract could occur). Thus, the question of when appellant's cause of action accrued based on ISC's rejection of the lease is a question of state law.

B. Minnesota Law

The Minnesota Supreme Court stated:

> A cause of action accrues when the right to institute and maintain a lawsuit arises, when the action can be brought in a court of law without dismissal for failure to state a cause of action.

Levin v. C.O.M.B., 441 N.W.2d 801, 803 (Minn. 1989).

The trial court found that appellant's claim for breach of the entire lease arose when the lease was rejected. Appellant correctly asserts that the lease did not contain an acceleration clause. Therefore, appellant concludes he did not have a claim for breach under the lease until each successive monthly rental payment came due.

Under Minnesota law, a lease may be terminated

> when the landlord voluntarily assumes a position incompatible with the existence of the relationship of landlord and tenant as between said landlord and the original lessee.

Benasutti v. Coast-to-Coast (Cent. Org.), Inc., 392 N.W.2d 695, 697 (Minn. App. 1986) (quoting Bowman v. Plumb, 220 Minn. 547, 550, 20 N.W.2d 493, 494-95 (1945)). "A lease may be terminated where the lessee surrenders the premises and the lessor accepts that surrender." Id.

Here, ISC surrendered the premises according to the terms of the stipulation. Appellant accepted that surrender, regained possession, and was free to relet the premises. As of May 31, 1982, appellant was no longer bound by the terms of the lease. He knew that ISC would no longer perform its lease obligations and that he was not obligated to provide ISC with an opportunity to do so.

Under section 365 of the Bankruptcy Code, ISC's trustee needed bankruptcy court approval to either assume or reject the lease. 11 U.S.C. s. 365 (a); see also In Re Condominium Admin. Servs., Inc., 55 B.R. 792, 799 (Bankr. M.D. Fla. 1985) (written order required for assumption of lease). Because the trustee for ISC did not have the power to bind ISC to the stipulation without bankruptcy court approval, the termination of the lease did not become effective until the stipulation was adopted by the bankruptcy court.

Once the lease was terminated, appellant became entitled to "damages resulting from the breach." Provident

Mut. Life Ins. Co., v Tachtronic Instruments, Inc., 394 N.W.2d 161, 165 (Minn. App. 1986). Appellant's entire claim accrued upon termination of the lease. He did not have to wait to sue for each individual payment until it fell due. See Gruman v. Investors Diversified Servs. 247 Minn. 502, 508, 78 N.W.2d 377, 381 (1956); Provident, 394 N.W.2d at 165. Both parties expressed intent not to fulfill the contract terms. No practical reason is served by tolling the statute of limitations until a fictitious date of performance. Appellant had the right to sue for the entire amount and, unfortunately for him, that right accrued more than six years prior to the commencement of his action.

Appellant's claim for breach of the lease accrued with the bankruptcy court's March 30, 1982 order. Accordingly, Minnesota's six year statute of limitations bars appellant's entire claim. Minn. Stat. s 541.05, subd. 1.

Appellant vigorously contends that the parties cannot be deemed to have terminated the lease because section 365 (g) of the Bankruptcy Code deems the rejection of a lease to be a breach. However,

> The provisions of 11 U.S.C. 365 (g) are viewed as a means of establishing the time that a breach is deemed to occur and not as an attempt to establish remedies for damages resulting from the breach.

1 Bankr. Serv., L.Ed. s 5E:56 (1990). As discussed above, the "legal consequences of one party's failure to perform

its remaining obligations under contract is an issue of statute contract law." In Re Cochise College Park, Inc., 703 F.2d at 1348 n.4. Thus, the Bankruptcy Code does not control the question of whether the adopted stipulation constituted a termination of the lease.

3. Appellant claims that respondents are estopped from asserting the statute of limitations as a defense. We disagree.

> While estoppel is ordinarily a question of fact for the jury, when only one inference can be drawn from the facts, the question is one of law.

L & H Transp., Inc. v Drew Agency, Inc., 403 N.W.2d 223, 227 (Minn. 1987) (citations omitted). A party seeking to invoke the doctrine of equitable estoppel must establish three elements:

> (1) that promises or inducements were made; (2) that it reasonably relied upon the promises; and (3) that it will be harmed if estoppel is not applied.

Hydra-Mac, Inc. v Onan Corp., 450 N.W.2d 913, 919 (Minn. 1990).

The only evidence on the record supporting appellant's claim is that the parties stated "it would be desirable to settle this matter without incurring the costs of litigation." However, the efforts of the parties to settle without litigation failed. Those general statements are insufficient to invoke equitable estoppel. The trial court

properly granted summary judgment against appellant on this claim.

Affirmed.